

CPCS Children & Family Law Newsletter

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Changes to CAFL Trial Panel Performance Standards

As part of a larger project to update the CPCS Assigned Counsel Manual, CPCS reviewed the performance standards for all panels and recommended changes for approval by the Committee. The CAFL trial performance standards have been revised in a number of respects. Many of the changes are intended to provide additional guidance in certain areas of CAFL practice or to reflect changes in the statutory or decisional law. The most significant change is the requirement that all attorneys meet with their child clients at least quarterly. For a summary of the changes see page 6 of this newsletter. No revisions were made to the CAFL appellate performance standards. The changes will be effective March 1, 2004.

Changes to CPCS Billing Practices

CPCS has approved several changes to its billing practices. In particular, the annual hourly limit has been increased to 1850 hours for fiscal year 2004. In addition, beginning July 1, 2004, attorneys will be compensated for their time spent attending up to 8 hours of required CLEs. For details of these and other billing changes see page 5.

New CAFL Awards

Beginning in 2004, CPCS will grant an "Outstanding Advocate Award" to a CAFL lawyer in each county whose hard work and dedication have made a big difference, whether for a particular client or for many clients. CPCS will also recognize one attorney who has been in practice less than two years with a "New Lawyer Award" for showing exceptional promise in the field of child welfare. The nomination deadline is March 31, 2004. See page 12 for further details.

CPCS Annual Training Conference & 2004 Awards

The 2004 CPCS Annual Training Conference will be held on Friday, May 7 from about 8:30-5:00 at the Worcester Centrum Centre. Criminal Law, Children and Family Law, Post-Conviction, and Mental Health programs will be offered. The cost for the conference is a \$95 contribution to the CPCS Training Trust, which entitles participants to attend all seminars and the awards luncheon, and to receive conference materials from all of the programs offered. Enrollment is limited and available slots will be filled on a first-registered, first-served basis. The conference is only open to attorneys who accept assignments through CPCS. Please use the registration form posted at our website at www.state.ma.us/cpcs/training. See page 11 for information about nominations for the 2004 CPCS awards.

CAFL Case Summaries

Attached are the most recent review of appellate decisions in Children and Family Law cases. The case summaries can also be accessed on the CAFL website at www.state.ma.us/cpcs/cafl.

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CHIEF COUNSEL'S MESSAGE

CPCS Chief Counsel
William J. Leahy

**Deputy Chief Counsel,
Private Counsel Division**
Patricia A. Wynn

**CAFL Administrative
Office**

Co-Directors
R. Susan Dillard
Margaret T. Winchester
Training Director
Amy M. Karp
Staff Attorneys
Andrew L. Cohen
Andrew Hoffman
*Appellate Assignment &
Certification Coordinator*
Rita Caso
Admin. Support Specialist
Linda Bourasso
Administrative Secretary
Tamika Jones

CAFL Salem Office

Managing Attorney
Kathleen M. McCaffrey
Staff Attorneys
Peter Heffernan
Norah Kane
Jamie Wallerstein
Administrative Assistant
Angela Lahue
Social Workers
Cathy Brings
Sarah Derby

CAFL Springfield Office

Managing Attorney
Robin L. Stolk
Staff Attorneys
William D. Donohue
Ellen Ryan
Pamela Szmyt
Kally Walsh
Administrative Assistant
Stephanie Brooks
Social Worker
Margaret M. Higgins

“Better Pay for Bar Advocates”: A Rejoinder

If only the funding provided in Governor Mitt Romney's recently proposed budget for next year bore the slightest relationship to the sunny picture painted by Chief Legal Counsel Dan Winslow in his February 9 “Viewpoint” piece in Massachusetts Lawyers Weekly. In fact, the Governor's budget, at \$75.8 million for over 250,000 cases in fiscal year 2005, slashes the funding needed to fulfill Massachusetts' legal obligation to provide counsel for poor persons in criminal defense, child welfare and mental health cases by over \$25 million. The Governor's budget largely ignores the reforms which the Committee for Public Counsel Services (CPCS) proposed in an effort to reduce counsel costs and improve the quality of our representation, and it attempts to evade the performance standards which have earned Massachusetts a well-deserved reputation as having the country's best-structured assigned counsel program.

I. The Money: Competent legal representation for the poor costs money. Some cases--criminal cases in the District and Municipal courts, for example--are individually rather inexpensive, with average case compensation just over \$202 last fiscal year. But, in Massachusetts, there are so many of them--over 137,000--that their private counsel compensation cost almost \$28 million last year. Other cases, such as the Care and Protection cases brought by the Department of Social Services, are much more expensive, averaging \$862 per client (child or parent) for legal representation in FY03. These cases consumed another \$18.5 million in private counsel compensation last year.

The Governor's \$75.8 million request falls some \$25 million short of the amount needed to fulfill Massachusetts' duty to enforce the right to counsel next year. At most, his budget identifies a total of eight million dollars in additional, non-tax revenue which might alleviate this massive underfunding. Even if every dollar were to be collected--and our analysis suggests strongly that it will not be--this budget would still be close to twenty million dollars in arrears.

II. CPCS Reforms Rejected by the Governor:

(1) CPCS proposed this year, as it has proposed many times over the past dozen years, the establishment of an Indigency Verification Unit to check the information provided by persons seeking the appointment of counsel. States such as Oregon have reported that creation of such a unit has reduced counsel costs by 10%, by providing real-time follow-up of the information provided by a person seeking counsel at the beginning of a case. Such a system can work, because the fiscal relief is timely. If the person can afford to hire an attorney, for example, the assignment can be revoked early, before extensive work has been done by the

publicly funded attorney. It is the difference between preventing fraud, and chasing fraud after it has occurred. Instead of embracing this practical approach, the Governor's budget proposes a complex collection lawsuit scheme, which both our experience and our national survey of defender agencies reveal to be impractical.

(2) CPCS proposed this year, as it did last year, that every determination of indigency be reviewed at least annually. Such reexaminations would save scarce funds by requiring the hiring of counsel in some cases, and would result in orders for counsel fee collections in others. The Governor's budget omits this reform.

(3) CPCS proposed major systemic reform in several areas. It has always been an incongruity that CPCS staff counsel were available to represent persons charged with major felonies, but not to represent children or parents in crisis. With the Legislature's support, we have established successful staff programs in both Child Welfare (in Salem and Springfield) and Juvenile Delinquency (in Roxbury) representation; but these programs have yet to be made available statewide. Given the counsel crisis caused by stagnant compensation rates and gubernatorial vetoes, it is time to make our Children and Family Law and Youth Advocacy programs available statewide. This reform would assure counsel to clients and improve the efficiency of the courts, which is an avowed goal of this Administration. The Governor recognizes the merit of this proposal, at least as to western Massachusetts; but the funding for such a proposal is nonexistent in the Governor's budget.

(4) We have calculated that up to \$2.5 million of that \$28 million spent on District Court criminal cases could be saved, if our proposal to allow judges to treat lesser misdemeanors as civil infractions under G.L. 277, §70C were approved. In fact, both branches of the Legislature did approve our amendment in 2001, but it was vetoed by Governor Swift. Instead of taking a decisive step to reduce counsel costs without jeopardizing our counsel assignment system, Governor Romney's budget merely adds one misdemeanor to the list of those eligible for civil treatment; but he continues to require a prosecutorial motion before a judge may act to save money.

(5) Mandatory drug sentencing is a national failure. A majority of states--but not Massachusetts--have now recognized that mandated treatment works better, and costs less. The \$3.6 million which CPCS spends to defend persons charged with mandatory drug offenses pales beside the estimated \$90 million which Massachusetts spends annually to incarcerate them; yet relaxing the mandatory sentence stranglehold would reduce our costs too. In our budget message, we urged Governor Romney to embrace the Massachusetts Sentencing Commission proposal concerning mandatory drug sentencing.

(6) The sex offender registration and dissemination bureaucracy reaches much far too back into the past, and therefore covers far too many former offenders. We have proposed that the rapidly escalating cost of this excess be reined in by statutory amendment; but the only changes endorsed by the Governor have been toward greater excess, and greater cost.

III. The Governor's Proposed Reforms:

(1) Reimbursement of the Value of Legal Services for Client Fraud: the Governor's budget assumes that CPCS will collect three million dollars in FY05 by contracting with collection lawyers to sue any client who "materially underestimates or misrepresents his income or assets or ability to pay to qualify for legal representation intended for destitute, indigent or marginally indigent persons[.]" First, the idea is misplaced in the CPCS budget, because CPCS has no information which would help it decide which clients it should turn over for collection action. It is the

Probation Department, not CPCS, which collects the financial information upon which a counsel assignment is made. CPCS possesses no data on which it could base a decision to sue a client on grounds of suspected fraud. Second, the allegedly careless or fraudulent client would be sued, not for the \$150 or \$300 which he arguably should have paid--but for \$5,000 \$7,500, or \$10,000, which is defined as the "fair market value of [the] attorney services[.]" This wild inflation--five thousand dollars is twenty-five times the average cost of legal representation for a District Court case--is designed to give collection outfits an incentive to participate in this scheme. In any actual case, of course, the "rebuttable presumption" of such drastic inflation would quickly fall earthward as the attorney for the client explains to the Court what the true cost of the representation actually was.

This court-clogging idea is as old as it is discredited. Our electronic survey of defender agencies revealed that a similar concept has been on the books in Kentucky since the 1970s, and nothing has ever been collected. The Administration could reduce fraudulent claims for counsel much more effectively by providing every judicial session with instantaneous electronic access to Department of Revenue and Registry of Motor Vehicles data. It is more effective to close the barn door before the horse escapes, than to chase it over hill and dale.

(2) The three categories of indigency: Mr. Winslow argues that the creation of a third ("destitute") category of indigency, and the creation of a series of detailed inquiries and written findings by the judge in every case, will "simplify" the assignment and counsel fee collection process. I think he should ask senior Probation Department officials for their assessment: those I have talked with point out that the current \$150 fee (the nation's highest) is already the "default" position, since it goes into effect unless waived by the judge. They express great concern that requiring judges to "conduct an inquiry of the person under oath and make specific written findings in the case docket" before finding a person "destitute" for counsel purposes will slow down the docket and make the courts less efficient. CPCS takes a back seat to no one in its insistence that our services be restricted to those who cannot afford to pay for a lawyer. That is why we proposed counsel fees back in 1990. That is why we worked with the Supreme Judicial Court to close loopholes in the indigency rules in 1993. That is why we pushed for and actively participated in Chief Justice Dortch-Okara's indigency verification working group in 1999-2000. That is why we have worked with the judges for years to improve counsel fee collections in lagging courts. There is nothing in our long experience in counsel fee collections which supports the notion that counsel fees from indigent persons can be made to quadruple in a single year.

(3) The first point to make about the "Retainer-Based Defined Compensation" system proposed by the Governor is that it provides attorneys and their clients absolutely no protection against funding shortfalls. It does nothing for a lawyer to be able to ask CPCS for a \$10,000 retainer, for example, if the funding has run dry--a danger we are currently facing due to the Governor's July, 2003 veto. The second obvious point is that the promise of "better pay" is not matched, nor even approximated in this budget. The direct appropriation number does not lie. Does any lawyer seriously think he or she is going to command more money from a \$75 million budget than from a \$98 million one? In his budget message, the Governor himself stated that the retainer system is "projected to save \$15 million in FY05." Our analysis confirms that the retainer-based program is designed to reduce compensation levels; not increase them. It does so by either eliminating or limiting the availability of hourly rates, and imposing flat fees which fail to compensate the attorney for the careful preparation and case investigation required by professional standards and CPCS Performance Guidelines. It is nice to see the Governor acknowledge the inadequacy of our current hourly rates; but his retainer-based plan provides no compensation for the thorough investigation and trial preparation which are the hallmarks of competent lawyering. The third point is that the retainer-based program would undo a decade of cost reduction progress by replacing the largely paperless CPCS E-bill system with endless mounds of paper submitted by

attorneys to justify their withdrawals. This is not progress.

Beyond these realities, the proposal itself is fiscally irresponsible, and filled with inefficiencies. It requires CPCS to pay out \$10,000 retainers on July 1 to “all bar advocates and attorneys assigned by the private counsel division[.]” Thus, CPCS would be required to pay over \$25 million on the first day of the fiscal year, before any services were provided. Almost \$6.4 million of that amount would go to the more than 600 lawyers who took one or more CPCS assignments last year, but who did not perform \$10,000 worth of work during the entire year. At the end of the fiscal year, CPCS would attempt to reclaim the unearned portion of those millions, “with the board of bar overseers as well as [by] institut[ing] civil proceedings to recover any unearned retainer or interest accrual that is not returned by participating attorneys.”

After a thorough review, CPCS Private Counsel Division Deputy Chief Counsel Patricia Wynn reported to the Committee that “the new system replaces one which rewards performance and encourages vigorous advocacy by paying hourly rates with one in which the client’s interests and an attorney’s financial interests are in conflict; many legal services and expenses are unpaid; compensation is reduced; experienced, senior attorneys are encouraged to discontinue assigned counsel work; mentors are unavailable; and zealous advocacy is discouraged.” This is not reform, which implies improvement. This is retrenchment and retreat.

(4) There are some good ideas within the Governor’s budget proposal. We endorse his proposal to provide malpractice defense and indemnification to CPCS assigned private counsel; although our experience cautions against Mr. Winslow’s assurance that there are few claims against bar advocates. We support the amendment to supplement private bar representation with staff counsel as needed to ensure counsel availability in the four western counties. We are pleased with the concept of year-end payments of up to 25% for private counsel and staff counsel alike; we wish only that the funding to afford those increases had accompanied the thought.

Even in these difficult economic times, many areas of state responsibility have received level or increased funding in the Governor’s budget proposal. Last spring, during the 40th anniversary celebrations of the famous Gideon right-to-counsel decision, some commentators questioned America’s resolve for vigorous enforcement of that landmark constitutional rule. It is very disappointing to see the lack of commitment to such an essential societal principle expressed by Governor Romney’s budget proposal concerning the Committee for Public Counsel Services.

CPCS BILLING UPDATES

Quarterly Billing for District Court, Juvenile Delinquency, And Youthful Offender Cases Beginning January 1, 2004

The following is a summary of the new quarterly billing option for District Court, Juvenile Delinquency, and Youthful Offender cases that was announced in November.

1. EBill will accept quarterly bills for these cases on January 1, 2004. On that date and for thirty days thereafter you may bill on all open cases for dates of service for the first two quarters of FY2004. The first two quarters cover dates of service from July 1, 2003 through December 31, 2003. If you opt to quarterly bill in January, the EBill for each case must include first quarter (July – September) and second quarter (October – December) dates on the same EBill.
2. Quarterly billing is not mandatory, therefore there is no penalty for not quarterly billing.
3. It is still mandatory that closed cases be billed within thirty days after the last service date.

Closed case bills that are received more than thirty days after the last service date are considered to be late filed bills and are subject to a 10% reduction. The 10% reduction is statutory. See, G.L. c. 211D, § 12.

4. If you do not quarterly bill, please be mindful of our assessment of our current financial status for fiscal year 04. Given our present funding and the existing rates and billing policies, we have sufficient funds to pay for all services rendered AND BILLED through the third quarter. In other words, our presently available funding is sufficient to pay for three quarters of services, though to be absolutely sure that you access these funds you should quarterly bill.
5. The third quarter covers dates of service in January through March. If you wish to quarterly bill for those services you should do so within thirty days after the close of the third quarter. The third quarter closes on March 31. If you submit a third quarter bill before March 31, you will be precluded from submitting an additional interim bill for the third quarter.
6. The fourth quarter covers dates of service in April through June. EBills submitted for the fourth quarter are end-of-fiscal year bills and should be designated as such on your EBill. End-of-fiscal year bills must be received by August 1, 2004.

If you have questions about quarterly billing on District Court, Juvenile Delinquency, or Youthful Offender cases please e-mail Gina Dembowski at rdembowski@publiccounsel.net or Pat Wynn at pwynn@publiccounsel.net. Both are also available by telephone at 617-988-8400 and 617-988-8383, respectively.

Annual Billing Limit Increased For FY 2004

The Committee also approved an increase in the annual billing limit. Effective for this fiscal year, 2004, the annual billing limitation has been increased from 1800 to 1850 hours.

Compensation for Required CLE Training Effective July 1, 2004

Beginning July 1, 2004, assigned counsel may bill CPCS for time spent attending up to 8 hours of required continuing legal education training each fiscal year. Compensation is only for the hours spent attending training. CPCS cannot compensate attorneys for seminar registration fees and encourages attorneys to attend the free CPCS-sponsored trainings presented by the CAFL Regional Coordinators. More details about how to bill for training time will be provided to CAFL attorneys in June 2004.

REVISIONS TO CAFL TRIAL PANEL PERFORMANCE STANDARDS

Last fall, the Committee voted to approve revisions to the CAFL trial panel performance standards. The new standards are effective March 1, 2004. They can be found on-line at www.state.ma.us/cpcs/cafl along with a detailed summary of the changes. Many of the revisions are minor. Some new sections were added to address changes to the law or to provide additional guidance in particular areas. Many of the changes are contained in the commentaries to the practice standards.

Quarterly Contact with Child Clients

Perhaps the most significant change is the new requirement that counsel have in-person contact with all child clients at least quarterly, except in extraordinary circumstances. Performance Standard No. 1.5(b). This requirement is a minimum. The frequency of contact with any particular child client will depend on the circumstances of the case. For some children, quarterly contact will be insufficient. The “extraordinary circumstances” that excuse counsel from this requirement might include situations in which the child is so fragile that

contact with counsel may cause psychological harm, or in which the client resides out of state at such a distance that quarterly contact is impractical.

This policy is the result of much internal deliberation at CPCS, and reflects a number of important considerations. While many attorneys maintain regular and frequent contact with their child clients, unfortunately a common complaint from judges and others across the state continues to be that some attorneys have no contact with their child clients. While we appreciate the high quality of representation provided by many CAFL attorneys, the quarterly contact requirement is an effort to address this long-standing concern on a statewide basis.

In developing and maintaining a mutually trusting relationship with the child client, there is no substitute for regular, frequent, personal contact. Child's counsel must develop and advocate for the child's position, as opposed to merely serving as a rubber stamp for another party's position. Client contact is indispensable in developing the child-client's position. Even where the child client is pre-verbal, it is imperative that counsel obtain first-hand knowledge of the child's placement and care. Counsel cannot rely solely on others for information about the child's circumstances, and cannot assume that because he or she has heard nothing new from the social worker or collaterals that there has been no change in the child's situation.

Most child clients are unlikely to contact their attorney to report problems. They will not call to find out the status of their case. Many child clients do not know or understand their rights. Others provide different information to different adults in their lives, whether in an effort to please them or for other motivations. It is vital that child's counsel establish with the child his or her role as the advocate for the child, no matter what the circumstances. The only effective means for doing so is regular, frequent, in-person contact throughout the life of the case.

Other Changes to the Performance Standards

Many of the remaining changes are intended to provide additional guidance for attorneys on topics already covered by the standards such as: when counsel's appointment ends (No. 1.3); conflicts of interest (No. 1.4); temporary custody hearings (Nos. 2.1-2.3); and trials (Nos. 6.1-6.2). In addition, new sections were added to address in more detail counsel's obligations regarding visitation (No. 4.2); custody and placement (No. 4.3); interlocutory appeals (No. 4.6); experts (No. 4.7); and permanency hearings (No.5). Some of the old sections were renumbered to accommodate these additions.

CPCS NEWS IN BRIEF

New Report on Crisis in Western Massachusetts

Many of you have heard of a new report CPCS commissioned entitled "Western Massachusetts Child Welfare Cases: The Court-Appointed Counsel System in Crisis." This report is the result of an extensive study conducted by The Spangenberg Group of West Newton, Mass. during the spring and summer of 2003. Last year the SJC awarded CPCS Court Improvement Funds to undertake this project. Our goal was to learn what could be done to address the critical shortage of attorneys available to represent children and parents in the juvenile courts in western Massachusetts. This shortage contributed to mounting delays and problems in the processing of care and protection cases. The report has findings and recommendations that are applicable not only to attorneys and courts in the west, but also to anyone who supports a legal system that will resolve child welfare cases promptly and fairly. The report is posted on the CPCS web site at www.state.ma.us/cpcs.

New Staff in CAFL Boston Office

We are very pleased to announce that Linda Bourasso has joined the CAFL staff in our Boston office. Linda provides administrative support to Co-Director Margaret Winchester and Training Director Amy Karp. Prior to joining CPCS, Linda was the Executive Assistant to the General Counsel of Stop & Shop. Linda can be reached at 617-988-8414 and her email address is lbourasso@publiccounsel.net.

Approved CLES Now on the Web

A list of CAFL approved CLE programs can be found on our website at state.ma.us/cpcs/CAFL/. To request approval for a program not on the list, please fax a description to Amy Karp at 617-988-8455 or email her at akarp@publiccounsel.net. In order to maintain CAFL trial panel certification, attorneys must complete 8 hours of approved continuing legal education programs each fiscal year subsequent to the year in which they completed the basic certification training. The fiscal year runs from July 1 to June 30. Please submit proof of attendance to Rita Caso, CAFL Certification Coordinator, CPCS, 44 Bromfield St., Boston, MA 02108 or fax it to her attention at 617-988-8455.

CAFL PRACTICE & PROCEDURE

Adoption Promotion Act of 2003

President Bush recently signed into law the Adoption Promotion Act of 2003. The Act reauthorizes the Adoption Incentives Program, originally created by ASFA to reward states with cash bonuses if they increase the number of children adopted from foster care. The new law continues the bonus program and provides states additional cash payments for increasing the number of children adopted who are over the age of 8. Statistics show that roughly half of the foster children waiting to be adopted nationwide are 9 and up.

Finding Incarcerated Clients

If you are trying to locate an incarcerated client two services may help. A website, www.vinelink.com, has information about correctional facilities in all states. The Massachusetts Department of Corrections (DOC) Central Records (978/405-6131) has information about inmates in Massachusetts correctional facilities. The DOC database does not include information about individuals held in county houses of correction.

Common Medical Abbreviations

Having trouble deciphering abbreviations in medical records? There is a helpful website for common medical abbreviations at <http://www.globalrph.com/abbrev.htm#HA>.

BOOK REVIEW

SHATTERED BONDS: THE COLOR OF CHILD WELFARE

In 2000, 6.5% of all children under 18 in Massachusetts were black. Yet black children comprised 12.4% of all substantiated reports of child maltreatment and 17.3% of all children in foster care. U.S. Dep't of Health and Human Services, *Child Welfare Outcomes 2000: Annual Report*. Hispanic children made up 10.5% of the general population but 20.3% of children in foster care. *Id.* In other states, minority children are overrepresented in foster care at even higher rates. *Id.* See also R. Wright & Hon. W. Thomas, *Communities of Color in the Domestic Violence, Juvenile Justice, and Child Welfare Systems*, 54 *Juvenile and Family Court Journal* 87 (Fall 2003).

In the book *Shattered Bonds: The Color of Child Welfare*, Professor Dorothy Roberts of Northwestern University School of Law, explores the causes of the disproportionate representation of children of color in the child welfare system. Citing numerous state and national studies, as well as anecdotal evidence, Professor Roberts explains that black families are more likely than white families to be reported for abuse or neglect. Once reported, black children are more likely than white children to be removed from their parents, rather than receive services in-home that would allow the family to remain intact. Once removed, they remain in foster care longer than white children, even if they end up being reunified with their parents. They receive fewer services than white children while in foster care, including mental health treatment. Their parents receive less help than white parents from their case workers with issues like housing. They receive less visitation with their parents than white families. Black children are less likely than white children to be adopted, and more likely to age out of foster care.

Professor Roberts acknowledges that black families are overrepresented in the child welfare system in large part because they are disproportionately poor and poor families are much more likely to be subject to state intervention. Yet according to Professor Roberts, even when controlling for income, black families are more likely than white families to have their children removed. She argues that stereotypes about black mothers and fathers influence decision-making, resulting in a greater willingness to remove black children from their homes.

Based on exhaustive research tracing the intertwined histories of state intervention and racial and socioeconomic discrimination, Professor Roberts also argues that racial disparities in the child welfare system reflect a purposeful agenda of addressing child maltreatment not in response to the actual need for intervention, but in moral, punitive tones -- an agenda that affects low-income black families disproportionately. Because black families more heavily occupy the lower rungs of the socioeconomic ladder, they have suffered the most under a child welfare system that from its beginnings has been designed to punish low-income parents, whose poverty is taken as a sign of inferiority. Professor Roberts concludes that our society tolerates this system because such a large percentage of the affected families are black, and black family bonds are valued less than those of white families.

A main target for Professor Roberts is the trend, ushered in with the Adoption and Safe Families Act, of emphasizing permanency through adoption at the expense of family preservation. She argues that in the debate over permanency versus family preservation, the pendulum has swung too far in favor of the former. Because black families are disproportionately represented in the child welfare system, the move to dismiss family preservation efforts as ultimately more harmful than beneficial to children and expedite adoptions has fallen disproportionately on them. Rather than focus on faster and more adoptions, Professor Roberts posits, the response to child maltreatment as a societal problem should involve a reexamination of the true causes of child maltreatment and a commitment of the resources necessary to effect real change. Professor Roberts challenges the subtle but pervasive message that the best we can do for low-income black children is to remove them on a wholesale basis from their families and communities.

UPDATE ON EDUCATION FOR HOMELESS CHILDREN & YOUTH

As a result of a new guidance issued by the US Department of Education (USDOE) last summer, local schools are no longer applying McKinney-Vento's protections to children in DSS custody. However, advocates are hopeful that this policy will change shortly as a result of a letter recently sent to the USDOE from the Mass. Departments of Education and Social Services. In the mean-

time, counsel for children must try to negotiate alternative solutions with DSS and the schools.

The McKinney-Vento Act is a federal law that protects the rights of homeless children to an education. 42 U.S.C. §§ 11301, 11431-11434a. McKinney-Vento provides special protections to enable homeless children and youth to succeed in school. For example, homeless children must be immediately enrolled in the school where they are living even if they do not have immunization or other required records. Homeless children also have the option of attending either the school where they are living or their last school. If they wish to return to their old school, transportation must be provided (the cost to be shared by the two school systems).

McKinney-Vento defines homeless children and youth to include those living in "emergency or transitional shelters" and children "awaiting foster care." Although "awaiting foster care" is not defined, in the past the statute was interpreted to mean that children in DSS custody living in shelters or other short-term or emergency placements (e.g., hotline homes, Bridge homes) are covered by McKinney-Vento.

Last summer, the USDOE issued a "Guidance," which states that children in foster care do not fall under McKinney-Vento. In addition, the Guidance defines "foster care" by using the definition from the federal HHS regulations, which basically includes any placement used by DSS. Under the Guidance, every child in DSS custody is considered in "foster care" regardless of their placement. As a result, many schools in Massachusetts and elsewhere have stopped providing McKinney-Vento's protections to children in DSS custody.

However, recently the Commissioners of DSS and DOE wrote a letter to the USDOE regarding the new guidance. In the letter, the Commissioners stated that their agencies have agreed that McKinney-Vento should apply to children in shelters, hot-line homes, bridge homes and diagnostic placements. They further agreed that McKinney-Vento should apply to children who, because of limited resources, are placed in residences that are not temporary by design (e.g. foster homes), but are emergency or transitional placements for the particular child. The Commissioners intend to implement their agreement effective March 1, 2004 unless the USDOE informs them the agreement does not comport with the McKinney-Vento statute.

Until this new agreement between DSS and DOE is implemented, you can try arguing that the school should do what is best for the child even if they are not required to by federal law. Studies suggest that children take 4 to 6 months to recover academically from the disruption of changing schools. See *Improving Educational Outcomes for Youth in Care: A National Collaboration* (Child Welfare League of America 2002). If the child's placement is truly temporary you can argue that it makes little sense to require the child to attend a brand new school for a short period of time. The biggest obstacle will be getting schools to pay to transport children back to their old school (this can run as high as \$150 a day). You can suggest that the school system use "Title I" money for transportation (apparently the state DOE is suggesting this to school systems). Also see if DSS can transport the child, or get the child moved closer to the school. If it is an older youth, see if a combination of public transportation and the school bus might reduce the school's costs but still be practical for the student.

In addition, under a pre-McKinney memo of understanding between DOE and DSS, children in Bridge Homes may attend their home school and the school systems are required to accept them. (The memo is available on the DOE web site at www.doe.mass.edu then click on Commissioner's update, then click on commissioner's update archives, then go to August 17, 1999.) Although the school systems do not have to transport the children under the new federal guidance, DSS has indicated that the Bridge Homes must transport the children back to their home school. There

have been a number of situations where the school systems are withdrawing transportation and the Bridge Homes are simply enrolling the children in the school where the home is located. If the child wants to attend his or her home school, the Bridge Home should be transporting them!

Advocates believe the USDOE Guidance is unlawful because it is contrary to the statute. It eliminates "awaiting foster care" as a category of homeless children. It also excludes from McKinney-Vento protections, children in DSS custody who are living in "emergency or transitional shelters," even though other children living in the same or similar placement do fall under the McKinney-Vento Act's protections. (This raises equal protection issues as well.) If you have a situation where a foster child is being deprived of McKinney under the new Guidance, please let us know. We want to keep track of the cases for possible challenges to the Guidance. You can call or email Amy Karp at (617) 988-8382 or akarp@publiccounsel.net or Andrew Hoffman at (617) 988-8441 or ahoffman@publiccounsel.net.

CPCS ACCEPTS NOMINATIONS FOR 2004 AWARDS

At CPCS's Annual Training Conference on May 8, 2004, CPCS will present its annual awards, including the Paul J. Liacos Mental Health Advocacy Award and the Mary C. Fitzpatrick Children and Family Law Award. Nominations for all awards should be submitted to William J. Leahy, Chief Counsel, CPCS, 44 Bromfield Street, Boston, MA 02108; or by email at wleahy@publiccounsel.net. The deadline for nominations is March 31, 2004. A description of the awards follows:

- The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy --- the central principle governing the representation of indigents in Massachusetts.
- The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.
- The **"Jay D. Blitzman Award for Youth Advocacy"** is presented annually to a person who has demonstrated the commitment to juvenile rights which was the hallmark of Judge Blitzman's long career as an advocate. Judge Blitzman was a public defender for twenty years and, in 1992, he became the first director of the Youth Advocacy Project. The award honors a person, who need not be an attorney, who has exhibited both extraordinary dedication and excellent performance in the struggle to assure that children accused of criminal conduct or who are otherwise at risk are treated fairly and with dignity.
- The **"Paul J. Liacos Mental Health Advocacy Award"** is presented annually to a public defender or private attorney whose legal advocacy on behalf of indigent persons involved in civil and/or criminal mental health proceedings best exemplifies zealous advocacy in furtherance of all clients' legal interests.
- The **"Mary C. Fitzpatrick Children and Family Law Award"** is presented annually to a public or private attorney who demonstrates zealous advocacy and an extraordinary

commitment to the representation of both children and parents in care and protection, children in need of services, and termination of parental rights cases. The award was named for Judge Fitzpatrick in recognition of her longstanding dedication to the child welfare process and the well-being of children in the Commonwealth. Judge Fitzpatrick has long been an advocate for the recognition of rights of children and parents as well as for the speedy resolution of child welfare matters.

NOMINATIONS REQUESTED FOR NEW CAFL AWARDS

Do you know of an attorney who always goes the extra mile for clients or who, through perseverance and skill, achieves vital goals for his or her clients? If you do, we want to hear from you.

CPCS is pleased to announce two new awards for attorneys on the Children and Family Law (CAFL) trial and appellate panels. We are aware that CPCS, the legal community and the public rarely acknowledge the extraordinary efforts child welfare attorneys make for their clients. Attorneys in these cases can, through hard work and perseverance, make huge differences in the lives of parents and children. Beginning in 2004, CPCS will grant an "Outstanding Advocate Award" to a lawyer in each county whose hard work and dedication have made such a difference, whether for a particular client or for all of the attorney's clients. The Award will be given at a regional coordinator training in that attorney's county. The award winners will be announced in the CAFL newsletter and on our website.

CPCS will also recognize one attorney who has been in practice less than two years with a "New Lawyer Award." One new lawyer will be recognized for showing exceptional promise as an attorney in the field of child welfare.

We encourage each of you to share stories about your colleagues who deserve recognition for the work they do for clients both inside and outside the courtroom. Please send nominations for both the "Outstanding Advocate Award" and the "New Lawyer Award" to either your regional coordinator or to Linda Bourasso at the Children and Family Law Program in Boston. Linda's e-mail is lbouasso@publiccounsel.net. The deadline for nominations is March 31, 2004.

COMMITTEE FOR PUBLIC COUNSEL SERVICES CHILDREN & FAMILY LAW NEWSLETTER

The Children and Family Law Program gratefully acknowledges the assistance of Legal Intern Nadia Somani of Northeastern University Law School in drafting this newsletter and case summaries.

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